

STATE OF MICHIGAN
DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET February 23, 2012
PROCUREMENT
P.O. BOX 30026, LANSING, MI 48909
OR
530 W. ALLEGAN, LANSING, MI 48933

CHANGE NOTICE No.1
TO
CONTRACT NO. 071B1300297
between
THE STATE OF MICHIGAN
and

NAME & ADDRESS OF CONTRACTOR Mead Johnson & Company, LLC 2400 West Lloyd Expressway Evansville, IN 47721-0001 Email: Michael.Milligan@mjn.com		TELEPHONE(812) 429-5210 J. Michael Milligan
		CONTRACTOR NUMBER/MAIL CODE
		BUYER/CA (517) 373-0301 Sue Cieciva
Contract Compliance Inspector: Penny Saites (517) 335-5096 e-mail: saitesp@michigan.gov WIC Infant Formula Rebate Program – Department of Community Health		
CONTRACT PERIOD: 5 years From: November 1, 2011 To: October 31, 2016		
TERMS N/A	SHIPMENT As Directed by Ordering Vendor	
F.O.B. Delivered	SHIPPED FROM Mt. Vernon, IN	
ALTERNATE PAYMENT OPTIONS: <input type="checkbox"/> P-card <input type="checkbox"/> Direct Voucher (DV) <input type="checkbox"/> Other		
MINIMUM DELIVERY REQUIREMENTS N/A		
MISCELLANEOUS INFORMATION:		

NATURE OF CHANGE(S):

Effective immediately, the buyer is hereby **CHANGED** to Sue Cieciva.

AUTHORITY/REASON(S):

Per DTMB Procurement.

TOTAL ESTIMATED CONTRACT VALUE: \$0.00

STATE OF MICHIGAN
DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET
PURCHASING OPERATIONS
P.O. BOX 30026, LANSING, MI 48909
OR
530 W. ALLEGAN, LANSING, MI 48933

June 28, 2011

NOTICE
OF
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		CONTRACTOR NUMBER/MAIL CODE		
		BUYER/CA (517) 373-6535 William C. Walsh, CPPB		
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MINIMUM DELIVERY REQUIREMENTS N/A				
MISCELLANEOUS INFORMATION:				

TOTAL ESTIMATED CONTRACT VALUE: **\$0.00**

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DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET
PURCHASING OPERATIONS
P.O. BOX 30026, LANSING, MI 48909
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MINIMUM DELIVERY REQUIREMENTS N/A		
MISCELLANEOUS INFORMATION: The terms and conditions of this Contract are those of ITB #07111300127 and Addenda, this Contract Agreement and the vendor's quote dated May 6, 2011. In the event of any conflicts between the specifications, and terms and conditions, indicated by the State and those indicated by the vendor, those of the State take precedence.		
Estimated Contract Value: \$0.00		

THIS IS NOT AN ORDER: This Contract Agreement is awarded on the basis of our inquiry bearing the ITB No. 071113001217.

All terms and conditions of the invitation to bid are made a part hereof.

FOR THE CONTRACTOR:

Mead Johnson & Company, LLC
Firm Name

Authorized Agent Signature
J. Michael Milligan

Authorized Agent (Print or Type)

Date

FOR THE STATE:

Signature
William C. Walsh, CPPB, Buyer/Manager

Name/Title
Commodities Division

Division

Date



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DEFINITIONS

24x7x365 means 24 hours a day, seven days a week, and 365 days a year (including the 366th day in a leap year).

ACS means Affiliated Computer Services, Inc., a Xerox Company responsible for processing EBT transactions and payments to WIC authorized vendors.

Additional Service means any Services within the scope of the Contract, but not specifically provided under any Statement of Work.

Audit Period means the seven year period following Contractor's provision of any work under the Contract.

Authorized WIC Vendor means any vendor Contractually authorized to accept Michigan WIC Bridge Cards from WIC clients for reimbursement by the State of Michigan. Michigan currently authorizes approximately 2022 vendors.

Bidder(s) are those companies that submit a proposal in response to this RFP.

Business Day means any day other than a Saturday, Sunday or State-recognized legal holiday from 8:00am EST through 5:00pm EST unless otherwise stated.

Blanket Purchase Order is an alternate term for Contract and is used in the Plan Sponsors' computer system.

Cancellation means ending all rights and obligations of the State and Contractor, except for any rights and obligations that are due and owing.

CCI means Contract Compliance Inspector.

CFR means Code of Federal Regulations.

Contract means a binding agreement entered into by the State of Michigan resulting from a bidder's proposal; also see "blanket purchase order".

Contract Brand Infant Formula means all infant formulas (except exempt infant formulas) produced by the manufacturer awarded the infant formula cost containment Contract. If under a single solicitation the manufacturer subContracts for soy-based infant formulas, then all soy-based infant formulas covered by the subContract are also considered Contract brand infant formulas. Contract brand infant formulas also include all infant formulas (except exempt infant formulas) introduced after the Contract is awarded.

Contractor means the successful bidder who is awarded a Contract.

Days means calendar days unless otherwise specified.

Deleted – N/A means that section is not applicable or included in this RFP. This is used as a placeholder to maintain consistent numbering.

Deliverable means physical goods and/or services required or identified in a Statement of Work.

Department means the Michigan Department of Community Health

DHHS means U.S. Department of Health and Human Services

DTMB means the Michigan Department of Technology Management and Budget.



Eastern Time; Either Eastern Standard Time or Eastern Daylight Time, whichever is prevailing in Lansing, Michigan.

EBT means Electronic Benefits Transfer which is the food delivery system that provides benefits using a card (the Michigan WIC Bridge Card) that permits electronic access to program benefits. The WIC client is able to redeem food benefits at authorized WIC vendors via scanning the Michigan WIC Bridge Card and entering their 4-digit PIN to approve the transaction.

Environmentally Preferable Products means a product or service that has a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. Such products or services may include, but are not limited to: those which contain recycled content, minimize waste, conserve energy or water, and reduce the amount of toxics either disposed of or consumed.

Exempt Infant Formulas means an infant formula intended for commercial or charitable distribution that is represented and labeled for use by infants who have inborn errors of metabolism or low birth weight or who otherwise have unusual medical or dietary problems (21 CFR 107.3). Infant formulas are classified as exempt infant formulas by the United States Food and Drug Administration.

Expiration means, except where specifically provided for in the Contract, the ending and termination of the Contractual duties and obligations of the parties to the Contract pursuant to a mutually agreed upon date.

FDA means United States Food and Drug Administration.

Hazardous Material means any material defined as hazardous under the latest version of federal Emergency Planning and Community Right-to-Know Act of 1986 (including revisions adopted during the term of the Contract).

Incident means any interruption in any function performed for the benefit of a Plan Sponsor.

Infant Formula is defined as any infant formula in the manufacturer's product line that 1) complies with the Infant Formula Act of 1980 as amended which defines "infant formula" as "a food which purports to be or is represented for special dietary use solely as a food for infants by reason of it's simulation of human milk or its suitability as a complete or partial substitute for human milk"; and 2) complies with the definition and requirements for "infant formula" under the federal Food, Drug and Cosmetic Act including [sections 201 (z) and 412 of act, 21 U.S.C. 321 (z) and 350a respectively], excluding "exempt infant formulas, [section 412(h) of the act 21 U.S.C. 350a (h)], and with all applicable Food and Drug Administration (FDA), Department of Health and Human Services regulations pursuant to the act, and the regulation at 21 U.S.C part 106 and 107.

ITB means Invitation to Bid.

Key Personnel means any personnel identified in **Section 2.4.2** as Key Personnel.

Manufacturer means a bidder that possesses the manufacturing and marketing capabilities necessary to fulfill all requirements specified in the RFP.

Michigan WIC Bridge Card means debit card onto which WIC food benefits are issued by WIC staff.

Net Price means the difference between an infant formula manufacturer's lowest national wholesale price per unit for a full truckload of infant formula and the rebate level or the discount offered or provided by the manufacturer under an infant formula cost containment Contract.

New Work means any Services/Deliverables outside the scope of the Contract and not specifically provided under any Statement of Work, such that once added will result in the need to provide the Contractor with additional consideration. "New Work" does not include Additional Service.



Non-Contract Brand Infant Formula means all infant formula, including exempt infant formula, that is not covered by an infant formula cost containment Contract awarded by the State agency.

Ozone-depleting Substance means any substance the Environmental Protection Agency designates in 40 CFR part 82 as: (1) Class I, including, but not limited to, chlorofluorocarbons, halons, carbon tetrachloride, and methyl chloroform; or (2) Class II, including, but not limited to, hydrochlorofluorocarbons.

Pollution Prevention means the practice of minimizing the generation of waste at the source and, when wastes cannot be prevented, utilizing environmentally sound on-site or off-site reuse and recycling. The term includes equipment or technology modifications, process or procedure modifications, product reformulation or redesign, and raw material substitutions. Waste treatment, control, management, and disposal are not considered pollution prevention, per the definitions under Part 143, Waste Minimization, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Post-Consumer Waste means any product generated by a business or consumer which has served its intended end use; and which has been separated or diverted from solid waste for the purpose of recycling into a usable commodity or product, and which does not include post-industrial waste.

Post-Industrial Waste means industrial by-products which would otherwise go to disposal and wastes generated after completion of a manufacturing process, but does not include internally generated scrap commonly returned to industrial or manufacturing processes.

Primary Contract Infant Formula means the specific infant formula for which manufacturers submit a bid to a State agency in response to a rebate solicitation under this section and for which a Contract is awarded by the State agency as a result of that bid.

Rebate means the amount of money refunded under cost containment procedures to any State agency from the manufacturer of the particular food product as the result of the purchase of the supplemental food with a voucher or other purchase instrument (EBT card) by a client in each State agency's program. Such rebates shall be payments made subsequent to the exchange of a food instrument (Michigan WIC Bridge Card) for food at an authorized WIC vendor.

Recycling means the series of activities by which materials that are no longer useful to the generator are collected, sorted, processed, and converted into raw materials and used in the production of new products. This definition excludes the use of these materials as a fuel substitute or for energy production.

Retail Purchase Food Delivery System is a food delivery system which the State of Michigan WIC Program operates. It enables WIC clients to go to an authorized store of their choice and shop to obtain supplemental WIC foods in exchange for Michigan WIC Bridge Card food benefits in accordance with the terms of a WIC authorized vendor Contract.

Reuse means using a product or component of municipal solid waste in its original form more than once.

RFP means a Request for Proposal designed to solicit proposals for services.

Settled Date is the date the State of Michigan WIC Program makes an electronic payment to an authorized WIC vendor.

Settled Price is the amount of money that the vendor is paid for a WIC authorized food item.

Services means any function performed for the benefit of the State.

SLA means Service Level Agreement.



Source Reduction means any practice that reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, energy recovery, treatment, or disposal.

State means the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents, for the purposes of indemnification as set forth in section 2.140.

State Location means any physical location where the State performs work. State Location may include state-owned, leased, or rented space.

SubContractor means a company selected by the Contractor to perform a portion of the Services, but does not include independent Contractors engaged by Contractor solely in a staff augmentation role.

Successful Bidder means the bidder(s) who is awarded a Contract as the result of solicitation.

Unauthorized Removal means the Contractor's removal of Key Personnel without the prior written consent of the State.

UPC means Universal Product Code, a number and barcode that identifies an individual product for purchase.

USDA means United States Department of Agriculture.

Waste Prevention means source reduction and reuse, but not recycling.

WIC means the Special Supplemental Nutrition Program for Women, Infants and Children.

WIC State Plan means a plan of Program operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of WIC Program administration within its jurisdiction in accordance with Federal Regulation (CFR 246.4), and as approved by the United States Department of Agriculture.

Work in Progress means a Deliverable that has been partially prepared, but has not been presented to the State for Approval.

Work Product refers to any data compilations, reports, and other media, materials, or other objects or works of authorship created or produced by the Contractor as a result of an in furtherance of performing the services required by the Contract.



Article 1 – Statement of Work

1.1 Project Identification

1.1.1 Project Request

This Contract is for a rebate program for infant formula purchased by the Michigan Women, Infants and Children (WIC) Program through the WIC retail food delivery system for a period of November 1, 2011 through October 31, 2016.

1.1.2 Background

In accordance with the “Child Nutrition Act of 1966, as Amended through the “Healthy, Hunger-Free Kids Act of 2010” P.L. 101-296, Dec. 13, 2010, the State of Michigan, Department of Community Health, (herein referred to as “The Department”), Special Supplemental Nutrition Program for Women, Infants, and Children (herein referred to as the “WIC Program”), is seeking infant formula cost-containment systems which will produce the maximum savings and thus allow for the greatest number of clients to benefit from WIC Program services.

The Michigan WIC Program is administered by the United States Department of Agriculture (USDA) through its Food and Nutrition Service Division which has promulgated regulations governing the program at 7 CFR 246.1, et seq. USDA has Contracted with the State of Michigan to implement the program through the Department in accordance with these regulations. As required by federal regulations, Michigan has adopted a WIC State Plan of program operation and administration that was submitted to and approved by the USDA. The WIC State Plan as approved by USDA establishes and governs the specifics as to how Michigan implements all aspects of the food program, including the administration and implementation of the WIC Infant Formula Rebate Program and this Contract.

The Department is the recipient of federal funds and is responsible for administering the WIC Program in Michigan in accordance with the Michigan WIC State Plan through a network of 48 local agencies, 211 local clinics and approximately 2022 WIC authorized vendors, retail food stores and pharmacies, throughout the State.

Eligible WIC clients receive WIC food instruments, Michigan WIC Bridge Cards, which may be redeemed at any of the 2022 WIC authorized retail food vendors throughout the State.

WIC food instruments Michigan WIC Electronic Benefit Transfer (EBT) Cards, are issued at clinic sites throughout the State to certified eligible pregnant, non-breastfeeding postpartum and breastfeeding women, and parents/guardians and/or proxies of certified eligible infants and children. These WIC EBT food benefits are specific in quantity and type (by UPC code) of nutritious foods, which may be purchased at an authorized WIC food vendor or pharmacy. Once a vendor performs the WIC EBT transaction, it is then redeemed by the vendor via electronic submission to the EBT Contractor (Affiliated Computer Services) for electronic payment processing to the vendor’s bank account. A series of prepayment edits are performed on each EBT transaction to ensure that specific redemption requirements are met. If the vendor requested dollar amount exceeds the maximum price for that food item, the vendor is only paid up to the maximum price for that food item which has been predetermined by the State of Michigan WIC Program.

The average monthly participation for Federal Fiscal Year 2010 was 256,500, including over 65,000 infants. Of these infants, 8,019 were exclusively breastfed, 53,956 were issued Contract brand infant formula and 3,201 were issued exempt infant formula. A modest savings in the cost of infant formula allows the State to provide services to a significant number of additional eligible participants.

Upon selection of a Contractor, the WIC Division will provide requisite notices of the Contracted brands of infant formulas to appropriate parties participating in the infant formula selection and delivery process. The Contractor should be prepared to assist the Department in serving notice upon affected parties including but not limited to wholesalers, retail food vendors, hospitals, physicians, clients, and local WIC agencies.



1.2 Scope of Work and Deliverable(s)

1.2.1 In Scope

The Contractor shall rebate to the Department a fixed amount per container of any infant formula in the manufacturer's product line that meets the definition described in the Definitions Section of a "Contract brand infant formula," such as soy-based, milk-based, partially hydrolyzed, or rice starch (cereal) added infant formula authorized by and purchased through the Michigan WIC Program.

The primary Contract infant formula will be the formula of first choice for issuance to infants with all other formulas issued as an alternative to the primary Contract infant formula. As stated in the Federal Register (CFR 246.16a(c)(7),(8)), the Michigan WIC Program reserves the right to approve for issuance some, none, or all of the winning bidder's other infant formula(s). In addition, the Michigan WIC Program may require medical documentation before issuing any Contract brand infant formula other than the primary Contract infant formula (see also CFR 246.10(d)(i) and 246.10 (d)iii)).

The Michigan WIC Program will issue infant formula in accordance with CFR 246.10(e)(1) through (e)(3) and (e)(9) of the WIC Program Regulations as described in the WIC State Plan. However, the Michigan WIC Program, in its sole discretion, reserves the right to utilize either the "Monthly Maximum" (CFR 246.10(e)(9) Table 1, Footnote 6) or the "Round Up" (CFR 246.10(h)) methodology for calculating maximum allowable infant formula quantities.

Out of Scope:

Exempt infant formulas issued by the Michigan WIC Program will not be subject to rebate billings. The Michigan WIC Program reserves the right to approve for issuance some, none, or all of the winning bidder's exempt infant formulas after the bidding process has been completed.

1.2.2 Deliverable(s)

Contractor must provide Deliverables/Services and staff, and otherwise do all things necessary for or incidental to the performance of work, as set forth below:

1. The Contractor must make available for redemption supplies of the Contractor's iron-fortified milk and soy-based liquid concentrate, powder, and ready-to-feed infant formula in sufficient quantities to serve the Michigan WIC Program caseload. By November 1, 2011, the Contractor must be able to adequately provide Contract infant formulas to supply approximately 53,956 infants at over 2022 authorized WIC vendors in 83 counties statewide on a monthly basis for 60 months.
2. The Contractor must remit to the Department a rebate per container in accordance with the reporting, billing and payment procedures described in Section 1.5.5 of this Contract.
3. A minimum of one iron-fortified milk based infant formula and one soy based infant formula in liquid concentrate, powder and ready-to-feed must be available. Infant formulas shall be nutritionally complete, not requiring the addition of any ingredients other than water prior to being served in a liquid state.
4. The iron-fortified milk-based infant formulas shall contain at least 10 milligrams of iron per liter of infant formula at standard dilution which supplies 67 kilocalories per 100 milliliters; e.g., approximately 20 kilocalories per fluid ounce of infant formula at standard dilution.
5. The Contractor must adhere to provisions set forth in FNS Instruction 800-2, dated. 6/21/92 and GAO 06-282, Feb. 2006:

"Use of WIC Service Marks



Manufacturer acknowledges that the WIC Acronym and the WIC Logo are service marks owned by the Department of Agriculture (USDA), and that all rights therein and goodwill pertaining thereto belong exclusively to USDA.

Manufacturer shall not use these service marks in any manner on its goods or their containers or packaging or on tags or labels affixed thereto. Manufacturer also shall not use the WIC Logo in advertising or other promotional materials (collectively: "advertising").

Manufacturer shall not use the WIC Acronym in advertising in any manner that is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of Manufacturer with the WIC Program, or as to the sponsorship or approval of Manufacturer's goods, services, advertising, or commercial activities, including nutritional message(s), by the WIC Program, USDA, or the State agency.

Manufacturer shall include the following statement with any use of the WIC Acronym in Advertising: "WIC is a registered service mark of the U.S. Department of Agriculture for USDA's Special Supplemental Nutrition Program for Women, Infants and Children."

6. The Contractor must agree to supply and provide a rebate on all physical forms of infant formula it produces that the State agency chooses to issue to any eligible WIC client, except exempt infant formula. This includes any new infant formula products introduced during the Contract term that meet the FDA definition of an "infant formula", as defined in the Infant Formula Act of 1980, including but not limited to soy-based, partially hydrolyzed, or rice starch (cereal) added formula.
7. Prior to the start date of the Contract, the Contractor must contact wholesalers, retail food vendors, hospitals and physicians in Michigan to assure adequate knowledge and notice of the change to the winning bidder's brands of infant formula for WIC participants, and assist WIC authorized vendors to change their stocking patterns for infant formula if a new brand is selected.
8. During the Contract period, the Contractor shall provide to the Department, for any manufacturer increase or decrease in lowest national wholesale truckload prices, a cent-for-cent increase or decrease in the rebate amount on the first day of the month following the increase or decrease. The increase or decrease shall apply to all of the EBT benefits issued with the Contractor's brands that are redeemed in the billing month of increase or decrease. Therefore the net price for each physical form may not be higher than the initial net price per container quoted in the Contractor's bid sheet.
9. The Contractor shall notify the Department in writing of any price increases or decreases, at the same time as other customers.
10. Any written communication from the Contractor to local WIC agencies or authorized WIC vendors regarding WIC Program policy or guidance will require prior written approval by the Department.

1.2.3 Quantity

The State is not obligated to purchase in any specific quantity.

1.2.4 Ordering

The Contractor is not authorized to begin performance until commencement of the Contract term or receipt of an executed Contract, whichever is later.

1.2.5 Alternate Bids- Deleted, Not Applicable



1.3 Management and Staffing

1.3.1 Project Management-

Within thirty (30) working days of the award of the Contract, the Contractor will submit to the WIC Division Project Manager for final approval of a work plan. This final implementation plan must be in agreement with Article 1, Statement of Work and accepted by the Project Manager, and must include the following:

1. The Contractor's staffing table with names and title of personnel assigned to the project. This must be in agreement with staffing of accepted proposal.
2. The Contractor's plan to supply WIC authorized vendors with sufficient quantities of the formulas included in the Contract before the official agreement start date of November 1, 2011.
3. The Contractor's plan to assist the Department in notifying affected parties of Contract brand infant formula changes, including wholesalers, retail food vendors, hospitals and physicians.
4. The Contractor's plan to assist WIC authorized vendors to change their stocking patterns for infant formula if a new brand is selected.

1.3.2 Reports- Deleted not applicable

1.3.3 Staff, Duties, and Responsibilities- Deleted, Not Applicable

1.3.4 Meetings

The State may request a kick-off meeting with the bidder within thirty (30) days of the award notification. The State may request other meetings as it deems appropriate.

1.3.5 Place of Performance- Delete – Not Applicable

1.3.6 Reserved

1.3.7 Binding Commitments- Deleted, Not Applicable

1.3.8 Training- Deleted, Not Applicable

1.3.9 Security- Deleted, Not Applicable

1.4 Delivery and Acceptance

1.4.1 Time Frames – Deleted, Not Applicable

1.4.2 Anticipated Contract Order Amount

It is anticipated that a minimum of 5,282,033 units of 13-ounce liquid concentrate, 24,612,087 units of 12 – 16 ounce powder and 55,067 units of ready-to-feed iron-fortified infant formula will be issued by the State of Michigan WIC Program during the 60 month Contract period. It is also anticipated that approximately 88% of the Contract formula issued will be milk-based, and approximately 12% will be soy-based. Except for the issuance of the primary Contract infant formula as formula of first choice, the Department provides no guarantee of the quantity, type, or physical forms that will be used under a new Contract. Refer to Article 1, Attachment D for State of Michigan WIC Program Contract brand infant formula issuance data between April and September 2010.

**1.4.3 Packaging – Delete – Not Applicable****1.4.4 Palletizing – Delete – Not Applicable****1.4.5 Delivery Term**

See Section 2.8.2, Delivery Responsibilities.

1.4.6 Acceptance Process – Delete – Not Applicable**1.4.7 Criteria – Delete – Not Applicable****1.5 Proposal Pricing****1.5.1 Pricing**

Pricing for this Contract is listed in **Attachment A**.

1.5.2 Quick Payment Terms – Delete – Not Applicable**1.5.3 Price Term****PRICE PROPOSAL**

Price level increases and decreases in the successful bidder's wholesale truckload prices after the bid has been received, and before the Contract effective date, will result in an automatic rebate increase or decrease on a cent-for-cent basis over the life of the Contract. The rebate amount per can will increase or decrease effective the first day of the Contract.

The same percentage discount bid for each authorized form of the primary Contract infant formula (concentrate, powder, and ready-to-feed) will be applied to all other Contract brand infant formulas approved by the Michigan WIC Program. Future rebates on all other infant formula including new formula and changed can sizes will be based on the same percentage as the corresponding physical form of the primary Contract formula.

As stated in federal register (CFR 246.16a(c)(6)(i-iv)) "All bids must specify the rebates offered by each bidder for the primary Contract brand infant formula(s). After the Contract is awarded, the State agency must calculate the percentage discount for all other Contract brand infant formulas (i.e., all other infant formulas produced by the bidder other than exempt infant formulas) approved for issuance by the State agency. The State agency must use the following method in calculating the rebates:

- (i) Rebates for Contract brand infant formulas, other than the primary Contract infant formula(s) for which bids were received, must be calculated by first determining the percentage discount for each physical form (e.g., concentrated liquid, powdered, and ready-to-feed) of the primary Contract infant formula(s). The percentage discount must be calculated by dividing the rebate for the primary Contract infant formula by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary Contract infant formula. The percentage discounts must be used to determine the rebate for all other Contract brand infant formulas approved for issuance by the State agency.
- (ii) The rebate for each type and form of all other Contract brand infant formulas must be calculated by multiplying the percentage discount by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the other Contract brand infant formula. The percentage discount used for each of the other Contract brand infant formulas depends on the physical form of the infant formula. For example, if the percentage discount provided for the primary Contract brand powdered infant formula is 80 percent of its wholesale price, the same percentage discount must be applied to all other



Contract brand powdered infant formulas. The rebate for any types or forms of Contract brand infant formulas that are introduced during the Contract period must be calculated using the wholesale truckload prices of these new Contract brand infant formulas at the time the infant formulas are approved for issuance by the State agency.

- (iii) The rebates resulting from the application of the percentage discount must remain the same throughout the Contract period except for the cent-for-cent rebate adjustments required in paragraph (c)(6) (iv) of this section.
- (iv) Bid solicitations must require the manufacturer to adjust rebates for price changes subsequent to the bid opening. Price adjustments must reflect any increase and decrease, on a cent-for-cent basis, in the manufacturer's lowest national wholesale prices for a full truckload of infant formula.

1.5.4 Tax Excluded from Price

- (a) Sales Tax: The State is exempt from sales tax for direct purchases. The bidder's prices must not include sales tax. DTMB-Purchasing Operations will furnish exemption certificates for sales tax upon request.
- (b) Federal Excise Tax: The State may be exempt from Federal Excise Tax, or the taxes may be reimbursable, if articles purchased under any resulting Contract are used for the State's exclusive use. Certificates showing exclusive use for the purposes of substantiating a tax-free, or tax-reimbursable sale will be sent upon request. If a sale is tax exempt or tax reimbursable under the Internal Revenue Code, the bidder's prices must not include the Federal Excise Tax.

1.5.5 Invoices

CONTRACT INVOICING AND PAYMENT

Within forty-five (45) days of the end of each Contract period calendar month, MDCH will produce a report specifying the number of units of Contract brand infant formula issued by MDCH during the Contract period, for which it has paid various retailers under the Michigan WIC Program account in the respective billing month. MDCH shall provide the number of units of Contract brand infant formula indicated in the report to the Contractor.

The Contractor shall make payment in full to the Department within thirty (30) days of the date of the invoice.

REPORTING AND BILLING PROCEDURES

1. The number of Contract brand infant formula units reported for rebate billing purposes shall be equal to the total number of Contract brand infant formula cans issued during the Contract period and redeemed according to State and Federal guidelines in the respective billing month. EBT transactions included in the billing month are based on the date payment was made to the vendor, also known as the Settled Date. WIC clients may redeem benefits during the issuance month or subsequent month, and thus rebate-eligible redemptions may fall outside the Contract period.
2. The number of units for each product and physical form (powder, concentrate or ready-to-feed) of the Contract brand infant formula shall then be multiplied by the Contract Rebate per Unit dollar amount to determine the total dollar amount due to the Department.
3. Any errors in calculation by the Department shall be rectified as expediently as possible by submitting an adjusted bill to the Contractor no later than forty-five (45) days from the date the error was fixed. Note that data system fixes may require coordination with the Michigan WIC Program data system release/update schedule.
4. MDCH will provide to the Contractor monthly invoices and supporting documentation consisting of an electronic file to be transmitted via FTP on a monthly basis. This file will contain information associated with EBT redemptions during the billing month. Each record will contain at a minimum: Authorization Number (the unique ID attached to each EBT card swipe), Benefit Start Date, Settled Date, Settled Price, Product UPC, and Quantity Redeemed.



5. The Contractor shall make an advance payment if requested by the Department. Such request may be made no sooner than thirty (30) days prior to the date for which the advance payment is requested. The advance payment request may not exceed the rebate payment calculated as described in this section of the RFP, for the most recent billing month for which data is available for the Department. Any amounts in excess of actual rebates due the Department shall be deducted from the next payment due the Department. The Department may make such request one time during a federal fiscal year. The Contractor may deduct from the prepayment up to one percent (1%) of the total prepayment invoice, or the discount can be applied to the next rebate invoice

1.6 Commodity Requirements

1.6.1 Customer Service- Deleted, Not Applicable

1.6.2 Research and Development- Delete – Not Applicable

1.6.3 Quality Assurance Program- Delete – Not Applicable

1.6.4 Warranty for Deliverable(s)- Delete – Not Applicable

1.6.5 Special Incentives- Delete – Not Applicable

1.6.6 Energy Efficiency- Delete – Not Applicable

1.6.7 Environmental Requirements- Delete – Not Applicable

1.6.8 Recycled Content and Recyclability- Delete – Not Applicable

1.6.9 Materials Identification and Tracking- Delete – Not Applicable

1.7 Extended Purchasing- Delete – Not Applicable



Article 2 – Terms and Conditions

2.1 Contract Term

2.1.1 Contract Term

The Contract term is 11/1/2011 through 10/31/2016.

2.1.2 Options to Renew Delete – Not Applicable

2.2 Payments and Taxes

2.2.1 Fixed Prices for Deliverable(s)

Refer to Section 1.5.3 Price Proposal.

2.2.2 Payment Deadlines Delete – Not Applicable

2.2.3 Invoicing and Payment – In General -Deleted, Not Applicable

2.2.4 Pro-ration [Deleted, Not Applicable]

2.2.5 Final Payment and Waivers – Delete – Not Applicable

2.2.6 Electronic Payment Requirement – Delete – Not Applicable

2.2.7 Employment Taxes

The Contractor must collect and pay all applicable federal, state, and local employment taxes.

2.2.8 Sales and Use Taxes

The Contractor must register and remit sales and use taxes on taxable sales of tangible personal property or services delivered into the State. If the Contractor lacks sufficient presence in Michigan to be required to register and pay taxes, it must do so on a voluntary basis. The requirement to register and remit sales and use taxes extends to (a) all members of a "controlled group of corporations" as defined in § 1563(a) of the Internal Revenue Code, 26 USC 1563(a), and applicable regulations; and (b) all organizations under common control that make sales at retail for delivery into the State. Any United States Department of Treasury regulation that references "two or more trades or businesses under common control" includes organizations such as sole proprietorships, partnerships (as defined in § 7701(a)(2) of the Internal Revenue Code, 26 USC 7701(a)(2)), trusts, estates, corporations, or limited liability companies.

2.3 Contract Administration

2.3.1 Issuing Office

This Contract is issued by DTMB-Purchasing Operations on behalf of the Michigan Department of Community Health (State). **DTMB-Purchasing Operations is the only entity authorized to modify the terms and conditions of this Contract, including the prices and specifications.** The Contract Administrator within DTMB-Purchasing Operations for this Contract is:

William C. Walsh, CPPB
Purchasing Operations
Department of Technology, Management and Budget
Mason Bldg, 2nd Floor
PO Box 30026
Lansing, MI 48909
Email: Walshw@michigan.gov
Phone: (517) 373-6535



2.3.2 Contract Compliance Inspector

The Contract Compliance Inspector, named below, will monitor and coordinate Contract activities. However, monitoring of this Contract implies **no authority to modify the terms and conditions of this Contract, including the prices and specifications.**

Penny Saites
MDCH Grants and Purchasing Division
320 South Walnut
Lansing, MI 48823
saitesp@michigan.gov
Phone: (517) 335-5096
Fax: (517) 241-4845

2.3.3 Project Manager

The Project Manager, named below, will oversee the project on a day-to-day basis. However, management of the project implies **no authority to modify the terms and conditions of this Contract, including the prices and specifications.**

Stan Bien, Director
WIC Division
Michigan Department of Community Health
320 So. Walnut St.
Lansing, MI 48913
biens@michigan.gov
Phone: 517-335-8448
Fax: 517-335-8835

2.3.4 Contract Changes

1. The Department reserves the right to approve or reject for issuance any new and improved infant formula introduced by the Contractor or any substitution for a similar existing product subsequent to the signing of this Contract. If the Contractor desires to substitute the new infant formula product for any of the Contract brand infant formula products, the Contractor shall pay a rebate that yields the same percentage discount on wholesale cost as the same physical form of the iron-fortified milk-based infant formula when used as a substitute.
2. If the Contractor replaces the primary Contract brand infant formula with a 'new and improved' formulation of the primary Contract brand infant formula, the manufacturer must either make the original primary Contract brand formula available for the remainder of the Contract period (at the same rebate), or provide a rebate on the newly formulated product that yields the same net cost per can (net wholesale cost per reconstituted ounce of formula if change in can size). In the event that the primary Contract brand infant formula described in the Contract is no longer available, the Department may terminate the Contract without further liability and solicit new bids.
3. If the Contractor desires to artistically change the appearance of the Contract brand infant formula units or labels during the Contract period (changes refer to but are not limited to label, color, shape, UPC Code, material) these anticipated changes shall be reported to the Department no later than when reported to other customers and prior to delivery to wholesalers, clinic, clients, and other health providers.
4. **Contractors who provide products or services prior to the issuance of a Contract Change Notice by DTMB Office, risk non-payment for the out-of-scope/pricing products and/or services.**

2.3.5 Price Changes – Deleted, Not Applicable



2.3.6 Notices

All notices and other communications required or permitted under this Contract must be in writing and will be considered given when delivered personally, by fax (if provided) or by e-mail (if provided), or by registered mail, return receipt requested, addressed as follows (or any other address that is specified in writing by either party):

If to State:

State of Michigan
DTMB-Purchasing Operations
Attention: William C. Walsh, CPPB
PO Box 30026
530 West Allegan
Lansing, MI 48909
Email: walshw@michigan.gov
Fax: (517) 335-0046

If to Contractor:

J. Michael Milligan
Mead Johnson & Company, LLC
2400 West Lloyd Expressway
Evansville, IN 47721-0001
(812) 429-5210
Michael.milligan@mjn.com

Delivery by a nationally recognized overnight express courier will be treated as personal delivery.

2.3.7 Covenant of Good Faith

Each party must act reasonably and in good faith. Unless otherwise provided in this Contract, the parties will not unreasonably delay, condition or withhold their consent, decision, or approval any time it is requested or reasonably required in order for the other party to perform its responsibilities under the Contract.

2.3.8 Assignments

(a) Neither party may assign this Contract, or assign or delegate any of its duties or obligations under the Contract, to another party (whether by operation of law or otherwise), without the prior approval of the other party. The State may, however, assign this Contract to any other State agency, department, or division without the prior approval of the Contractor.

(b) If the Contractor intends to assign this Contract or any of the Contractor's rights or duties under the Contract, the Contractor must notify the State and provide adequate information about the assignee at least 180 days before the proposed assignment or as otherwise provided by law or court order. The State may withhold approval from proposed assignments, subContracts, or novations if the State determines, in its sole discretion, that the transfer of responsibility would decrease the State's likelihood of receiving performance on the Contract or the State's ability to recover damages.

2.3.9 Equipment – Delete – Not Applicable

2.3.10 Facilities -Deleted, Not Applicable

2.4 Contract Management

2.4.1 Contractor Personnel Qualifications

All persons assigned by the Contractor to perform work must be employees of the Contractor or its majority-owned subsidiaries, or a State-approved SubContractor, and must be fully qualified to perform the work assigned to them. The Contractor must include this requirement in any subContract.

**2.4.2 Contractor Key Personnel**

J. Michael Milligan – Director, WIC Business Team
(812) 429-5210

Kathy J. Decker
(812) 429-8758
Kathy.decker@mjn.com

2.4.3 Removal or Reassignment of Personnel at the State's Request

The State may require the Contractor to remove or reassign personnel if the State has legitimate, good-faith reasons articulated in a notice to the Contractor. Replacement personnel must be fully qualified for the position. If the State exercises this right, and the Contractor cannot immediately replace the removed personnel, the State agrees to an equitable adjustment in schedule or other terms that may be affected.

2.4.4 Contractor Personnel Location – Delete – Not Applicable**2.4.5 Contractor Identification – Delete – Not Applicable****2.4.6 Cooperation with Third Parties Deleted – Not Applicable****2.4.7 Relationship of the Parties**

The relationship between the State and Contractor is that of client and independent Contractor. No agent, employee, or servant of the Contractor, or any of its subContractors, is an employee, agent or servant of the State. The Contractor will be solely and entirely responsible for its acts and the acts of its agents, employees, servants, and subContractors during the performance of the Contract.

2.4.8 Contractor Return of State Equipment/Resources – Delete – Not Applicable**2.4.9 Background Checks – Delete – Not Applicable****2.4.10 Compliance With State Policies – Delete – Not Applicable****2.5 SubContracting by Contractor Deleted – Not Applicable****2.5.1 Contractor Responsible – Deleted – Not Applicable****2.5.2 State Approval of SubContractor Deleted – Not Applicable****2.5.3 SubContract Requirements – Deleted – Not Applicable****2.5.4 Competitive Selection – Delete – Not Applicable****2.6 Reserved****2.7 Performance****2.7.1 Time of Performance**

- (a) The Contractor must immediately notify the State upon becoming aware of any circumstances that may reasonably be expected to jeopardize the completion of any Deliverable(s) by the scheduled due dates in the latest State-approved delivery schedule and must inform the State of the projected actual delivery date.



(b) If the Contractor believes that a delay in performance by the State has caused or will cause the Contractor to be unable to perform its obligations according to specified Contract time periods, the Contractor must immediately notify the State and, to the extent practicable, continue to perform its obligations according to the Contract time periods. The Contractor will not be in default for a delay in performance to the extent the delay is caused by the State.

2.7.2 Service Level Agreements -Deleted, Not Applicable

2.7.3 Liquidated Damages

The parties acknowledge that widespread unavailability of Contract infant formula exceeding 7 calendar days and affecting 5% or more of WIC participating infants will interfere with the timely and proper completion of the Contract, to the loss and damage of the Department, and that it would be impracticable and extremely difficult to fix the actual damage sustained by the Department as a result of any such delay. Therefore, Contractor and the Department agree that in the case of any such unavailability in respect of which the Department does not elect to exercise its rights under **INDEMNIFICATION**, the Department may assess liquidated damages against Contractor as specified in this Section.

If widespread unavailability of Contract infant formula exceeding 7 calendar days and affecting 5% or more of WIC participating infants occurs, then the Department shall be entitled to collect liquidated damages for each day Contractor fails to remedy the unavailability equal to the daily projected lost rebate amount.

The parties acknowledge that non-payment of infant formula rebate on a monthly basis will interfere with the timely and proper completion of the Contract, to the loss and damage of the Department, and that it would be impracticable and extremely difficult to fix the actual damage sustained by the Department as a result of any such delay. Therefore, Contractor and the Department agree that in the case of any such non-payment of infant formula rebate in respect of which the Department does not elect to exercise its rights under **INDEMNIFICATION**, the Department may assess liquidated damages against Contractor as specified in this Section.

If non-payment of infant formula rebate on a monthly basis occurs, then the Department shall be entitled to collect liquidated damages in the amount of \$5,000.00 per day for each day the Contractor fails to make payment.

ISSUE MANAGEMENT

The MDCH Project Manager and Contractor shall maintain immediate communication regarding issues of infant formula production, distribution, quality control issues, recalls, or rebates.

RISK MANAGEMENT

The Contractor must have a risk mitigation plan that assures a high quality product, and consistent availability of formula.

The State of Michigan WIC Program reserves the right to allow client redemption of alternative formulas if there are Contract brand infant formula shortages or outages, or availability/access issues for WIC approved vendors. In the event of a shortage/outage, the first option the State would pursue is to authorize redemption of the same Contract brand infant formula in a different physical form (liquid concentrate, powder, ready to feed) for the duration of the shortage/outage. If no forms of the Contract brand formula are readily accessible, alternative formula choices for WIC clients may include a different size of the same formula, or a different brand of formula, including a nutritionally comparable formula from another manufacturer (non Contract brand, non-exempt formula). If implementation of any of the alternatives noted in this paragraph are required due to Contract brand infant formula shortages or outages, the Contractor will be responsible for providing a rebate on the alternative product that yields the same net cost per can (net wholesale cost per reconstituted ounce of formula if change in can size), even if it is a different physical form of the same Contract brand of formula. In the event that Contract brand infant formulas are not readily available due to a shortage/outage, the Department may terminate the Contract without further liability and solicit new bids, and may hold the Contractor responsible for any excess costs occasioned thereby.

**2.7.4 Excusable Failure**

Neither party will be liable for any default, damage or delay in the performance of its obligations that is caused by government regulations or requirements, power failure, electrical surges or current fluctuations, war, forces of nature or acts of God, delays or failures of transportation, equipment shortages, suppliers' failures, acts or omissions of common carriers, fire, riots, civil disorders, labor disputes, embargoes, injunctions (provided the injunction was not issued as a result of any fault or negligence of the party seeking to have its default or delay excused), or any other cause beyond the reasonable control of a party; provided the non-performing party and any SubContractors are without fault in causing the default or delay, and the default or delay could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of alternate sources, workaround plans, or other means, including disaster recovery plans.

If a party does not perform its Contractual obligations for any of the reasons listed, the non-performing party will be excused from any further performance of its affected obligation(s) for as long as the circumstances prevail. The non-performing party must promptly notify the other party immediately after the excusable failure occurs, and when it abates or ends. Both parties must use commercially reasonable efforts to resume performance.

If any of the reasons listed substantially prevent, hinder, or delay the Contractor's performance of the Deliverable(s) for more than 10 Days, and the State reasonably determines that performance is not likely to be resumed within a period of time that is satisfactory to the State, the State may: (a) procure the affected Deliverable(s) from an alternate source without liability for payment so long as the delay in performance continues; or (b) terminate any portion of the Contract so affected and equitably adjust charges payable to the Contractor to reflect those Deliverable(s) that are terminated. The State must pay for all Deliverable(s) for which Final Acceptance has been granted before the termination date.

The Contractor will not have the right to any additional payments from the State as a result of any Excusable Failure or to payments for Deliverable(s) not provided as a result of the Excusable Failure. The Contractor will not be relieved of a default or delay caused by acts or omissions of its SubContractors except to the extent that a SubContractor experiences an Excusable Failure and the Contractor cannot reasonably circumvent the effect of the SubContractor's default or delay in performance through the use of alternate sources, workaround plans, or other means, including disaster recovery plans.

2.8 Acceptance of Deliverable(s)**2.8.1 Quality Assurance**

By tendering any Deliverable to the State, the Contractor certifies to the State that (a) it has performed reasonable quality assurance activities; (b) it has performed any reasonable testing; and (c) it has corrected all material deficiencies discovered during the quality assurance activities and testing.

2.8.2 Delivery Responsibilities

- (a) The Contractor is responsible for delivering the Deliverable(s) by the applicable delivery date to the ordering location(s).
- (b) The Contractor must ship the Deliverable(s) "F.O.B. Destination."

2.8.3 Process for Acceptance of Deliverable(s) – Delete – Not Applicable**2.8.4 Acceptance of Deliverable(s) – Delete – Not Applicable****2.8.5 Process for Approval of Written Deliverable(s) -Deleted, Not Applicable****2.8.6 Process for Approval of Services -Deleted, Not Applicable**

**2.8.7 Final Acceptance – Delete – Not Applicable****2.9 Ownership -Deleted, Not Applicable****2.10 State Standards -Deleted, Not Applicable****2.11 Confidentiality****2.11.1 Confidential Information**

The Contractor shall not have access to any records identifying Michigan WIC Program participants by name or address. The Contractor shall not have access to authorized WIC vendor information other than vendor's name, address and authorization status.

As used in this Section, "Confidential Information" means all information of the parties, except information that is:

- (a) disclosable under the Michigan Freedom Of Information Act (FOIA);
- (b) now available or becomes available to the public without breach of this Contract;
- (c) released in writing by the disclosing party;
- (d) obtained from a third party or parties having no obligation of confidentiality with respect to such information;
- (e) publicly disclosed pursuant to federal or state law; or
- (f) independently developed by the receiving party without reference to Confidential Information of the furnishing party.

2.11.2 Protection and Destruction of Confidential Information

- (a) Each party must use the same care to prevent unauthorized disclosure of Confidential Information as it uses to prevent disclosure of its own information of a similar nature, but in no event less than a reasonable degree of care. Neither the Contractor nor the State will: (i) make any use of the Confidential Information of the other except as contemplated by this Contract; (ii) acquire any interest or license in or assert any lien against the Confidential Information of the other; or (iii) if requested to do so, refuse for any reason to promptly return the other party's Confidential Information.
- (b) Each party will limit disclosure of the other party's Confidential Information to employees, agents, and SubContractors who must have access to fulfill the purposes of this Contract. Disclosure to, and use by, a SubContractor is permissible where: (i) use of a SubContractor is authorized under this Contract; (ii) the disclosure is necessary or otherwise naturally occurs in connection with work that is within the SubContractor's scope of responsibility; and (iii) Contractor obligates the SubContractor in a written Contract to maintain the State's Confidential Information in confidence. At the State's request, any employee of Contractor and of any SubContractor having access to the State's Confidential Information may be required to execute a separate agreement to be bound by the confidentiality requirements of this Section.
- (c) Upon termination of the Contract, Contractor must promptly return the State's Confidential Information or certify to the State that Contractor has destroyed all of the State's Confidential Information.

2.11.3 Exclusions

The provisions of Section 2.11, Confidentiality, will not apply where the receiving party is required by law to disclose the other party's Confidential Information, provided that the receiving party: (i) promptly provides the furnishing party with notice of the legal request; and (ii) assists the furnishing party in resisting or limiting the scope of the disclosure as reasonably requested by the furnishing party.

2.11.4 No Obligation to Disclose

Nothing contained in Section 2.11, Confidentiality, will be construed as obligating a party to disclose any particular Confidential Information to the other party.

**2.11.5 Security Breach Notification**

If Contractor breaches this Section, it must (i) promptly cure any deficiencies in Contractor's internal security controls; and (ii) comply with any applicable federal and state laws and regulations pertaining to unauthorized disclosures. Contractor and the State will cooperate to mitigate, to the extent practicable, the effects of any breach, intrusion, or unauthorized access, use, or disclosure. Contractor must notify the State of any unauthorized use or disclosure of Confidential Information, whether suspected or actual, within 10 days of becoming aware of the use or disclosure or a shorter time period as is reasonable under the circumstances.

2.12 Records and Inspections**2.12.1 Inspection of Work Performed – Delete – Not Applicable****2.12.2 Retention of Records**

- (a) The Contractor must retain all financial and accounting records related to this Contract for a period of seven years after the Contractor performs any work under this Contract (Audit Period).
- (b) If an audit, litigation, or other action involving the Contractor's records is initiated before the end of the Audit Period, the Contractor must retain the records until all issues arising out of the audit, litigation, or other action are resolved or until the end of the Audit Period, whichever is later.

2.12.3 Examination of Records

The State, upon 10 days notice to the Contractor, may examine and copy any of the Contractor's records that relate to this Contract. The State does not have the right to review any information deemed confidential by the Contractor if access would require the information to become publicly available. This requirement also applies to the records of any parent, affiliate, or subsidiary organization of the Contractor, or any SubContractor that performs services in connection with this Contract.

2.12.4 Audit Resolution

If necessary, the Contractor and the State will meet to review any audit report promptly after its issuance. The Contractor must respond to each report in writing within 30 days after receiving the report, unless the report specifies a shorter response time. The Contractor and the State must develop, agree upon, and monitor an action plan to promptly address and resolve any deficiencies, concerns, or recommendations in the report.

2.12.5 Errors

- 1. The Contractor may be entitled to recoupment of funds paid due to an over-billing error, after demonstration that the billing error has been verified by the Department.
- 2. The Contractor may also be entitled to recoupment of funds for infant formula billed that was not identified on redeemed food instruments after demonstrating that over-billing has occurred if the Department was notified of the mathematical error in writing within 30 days of receipt of the Department's invoice. The Contractor may only recoup funds in the instances stated above.
- 3. All disputes must be settled by closeout of the fiscal year in which the dispute occurred. If the Department has over-billed the Contractor, funds will be reimbursed within 45 days of the final resolution of the dispute.
- 4. Any review of WIC redemption data by the Contractor shall be for the sole purpose of recoupment in resolving discrepancies of over-billing or for validating infant formula redemption.
- 5. The Contractor shall not withhold any rebate payment due the Department under any circumstances.
- 6. The Contractor shall reimburse the Department for any funds owed the Department for under-billing due to billing errors or adjustments.



2.13 Warranties

2.13.1 Warranties and Representations

The Contractor represents and warrants:

- (a) It is capable of fulfilling and will fulfill all of its obligations under this Contract. The performance of all obligations under this Contract must be provided in a timely, professional, and workmanlike manner and must meet the performance and operational standards required under this Contract.
- (b) It is the lawful owner or licensee of any Deliverable licensed or sold to the State by Contractor or developed by the Contractor for this Contract, and Contractor has all of the rights necessary to convey to the State the ownership rights or licensed use, as applicable, of any Deliverable(s). None of the Deliverable(s) provided by Contractor to the State, nor their use by the State, will infringe the patent, trademark, copyright, trade secret, or other proprietary rights of any third party.
- (c) The Contract signatory has the authority to enter into this Contract on behalf of the Contractor.
- (d) It is qualified and registered to transact business in all locations where required.
- (e) Neither the Contractor nor any affiliates, nor any employee of either, has, will have, or will acquire, any interest that would conflict in any manner with the Contractor's performance of its duties and responsibilities to the State or otherwise create an appearance of impropriety with respect to the award or performance of this Contract. The Contractor must notify the State about the nature of any conflict or appearance of impropriety within two days of learning about it.
- (f) Neither the Contractor nor any affiliates, nor any employee of either, has accepted or will accept anything of value based on an understanding that the actions of the Contractor, its affiliates, or its employees on behalf of the State would be influenced. The Contractor must not attempt to influence any State employee by the direct or indirect offer of anything of value.
- (g) The Contractor arrived at its proposed prices independently, without communication or agreement with any other bidder for the purpose of restricting competition. The Contractor did not knowingly disclose its quoted prices for this Contract to any other bidder before the award of the Contract. The Contractor made no attempt to induce any other person or entity to submit or not submit a proposal for the purpose of restricting competition.
- (h) All financial statements, reports, and other information furnished by the Contractor to the State in connection with the award of this Contract fairly and accurately represent the Contractor's business, properties, financial condition, and results of operations as of the respective dates covered by the financial statements, reports, or other information. There has been no material adverse change in the Contractor's business, properties, financial condition, or results of operation.
- (i) All written information furnished to the State by or for the Contractor in connection with the award of this Contract is true, accurate, and complete, and contains no false statement of material fact nor omits any material fact that would make the submitted information misleading.
- (j) It will immediately notify DTMB-Purchasing Operations if any of the certifications, representations, or disclosures made in the Contractor's original bid response change after the Contract is awarded.

2.13.2 Warranty of Merchantability

The Deliverable(s) provided by the Contractor must be merchantable.

2.13.3 Warranty of Fitness for a Particular Purpose

The Deliverable(s) provided by the Contractor must be fit for the purpose(s) identified in this Contract.

**2.13.4 Warranty of Title**

The Contractor must convey good title to any Deliverable(s) provided to the State. All Deliverable(s) provided by the Contractor must be delivered free from any security interest, lien, or encumbrance of which the State, at the time of Contracting, has no knowledge. Deliverable(s) provided by the Contractor must be delivered free of any rightful claim of infringement by any third person.

2.13.5 Equipment Warranty – Delete – Not Applicable**2.13.6 New Deliverable(s) – Delete – Not Applicable****2.13.7 Prohibited Products**

Shipping of salvage, distressed, outdated, or discontinued goods will be considered a material default by the Contractor. The brand and product number offered for all items will remain consistent for the term of the Contract, unless DTMB-Purchasing Operations has approved a change order under Section 2.3.4, Contract Changes.

2.13.8 Consequences For Breach

In addition to any remedies available in law, if the Contractor breaches any of the warranties contained in Section 2.13, Warranties, the breach may be considered a material default.

2.14 Insurance**2.14.1 Liability Insurance**

For the purpose of this Section, "State" includes its departments, divisions, agencies, offices, commissions, officers, employees, and agents.

(a) The following apply to all insurance requirements:

(i) The State, in its sole discretion, may approve the use of a fully-funded self-insurance program in place of any specified insurance identified in this Section.

(ii) Where specific coverage limits are listed in this Section, they represent the minimum acceptable limits. If the Contractor's policy contains higher limits, the State is entitled to coverage to the extent of the higher limits. The minimum limits of coverage specified are not intended, and may not be construed to limit any liability or indemnity of the Contractor to any indemnified party or other persons.

(iii) If the Contractor fails to pay any premium for a required insurance policy, or if any insurer cancels or significantly reduces any required insurance without the State's approval, the State may, after giving the Contractor at least 30 days notice, pay the premium or procure similar insurance coverage from another company or companies. The State may deduct any part of the cost from any payment due the Contractor, or require the Contractor to pay that cost upon demand.

(iv) In the event the State approves the representation of the State by the insurer's attorney, the attorney may be required to be designated as a Special Assistant Attorney General by the Michigan Attorney General.

(b) The Contractor must:

(i) provide proof that it has obtained the minimum levels of insurance coverage indicated or required by law, whichever is greater. The insurance must protect the State from claims that are alleged or may arise or result from the Contractor's or a SubContractor's performance, including any person directly or indirectly employed by the Contractor or a SubContractor, or any person for whose acts the Contractor or a SubContractor may be liable.

(ii) waive all rights against the State for the recovery of damages that are covered by the insurance policies the Contractor is required to maintain under this Section. The Contractor's failure to obtain and maintain the required insurance will not limit this waiver.

(iii) ensure that all insurance coverage provided relative to this Contract is primary and non-contributing to any comparable liability insurance (including self-insurance) carried by the State.

(iv) obtain insurance, unless the State approves otherwise, from any insurer that has an A.M. Best rating of "A" or better and a financial size of VII or better, or if those ratings are not available, a



comparable rating from an insurance rating agency approved by the State. All policies of insurance must be issued by companies that have been approved to do business in the State.

(v) maintain all required insurance coverage throughout the term of this Contract and any extensions. However, in the case of claims-made Commercial General Liability policies, the Contractor must secure tail coverage for at least three years following the termination of this Contract.

(vi) pay all deductibles.

(vii) pay for and provide the type and amount of insurance checked ☒ below:

☒ **(A) Commercial General Liability Insurance**

Minimal Limits:

\$2,000,000 General Aggregate Limit other than Products/Completed Operations;

\$2,000,000 Products/Completed Operations Aggregate Limit;

\$1,000,000 Personal & Advertising Injury Limit; and

\$1,000,000 Each Occurrence Limit.

Deductible maximum:

\$50,000 Each Occurrence

Additional Requirements:

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents as additional insureds on the Commercial General Liability certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

☐ **(B) Umbrella or Excess Liability Insurance**

Minimal Limits:

\$10,000,000 General Aggregate

Additional Requirements:

Umbrella or Excess Liability limits must at least apply to the insurance required in (A), General Commercial Liability. The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents as additional insureds on the certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

☒ **(C) Motor Vehicle Insurance**

Minimal Limits:

If a motor vehicle is used in relation to the Contractor's performance, the Contractor must have vehicle liability insurance on the motor vehicle for bodily injury and property damage as required by law.

☐ **(D) Hired and Non-Owned Motor Vehicle Coverage**

Minimal Limits:

\$1,000,000 Per Accident

Additional Requirements:

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents as additional insureds on the vehicle liability certificate. The Contractor must also provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

☒ **(E) Workers' Compensation Insurance**

Minimal Limits:

The Contractor must provide Workers' Compensation coverage according to applicable laws governing work activities in the state of the Contractor's domicile. If the applicable coverage is provided by a self-insurer, the Contractor must provide proof of an approved self-insured authority by the jurisdiction of domicile.



For employees working outside of the state of the Contractor's domicile, the Contractor must provide certificates of insurance proving mandated coverage levels for the jurisdictions where the employees' activities occur.

Additional Requirements:

The Contractor must provide the applicable certificates of insurance and a list of states where the coverage is applicable. Contractor must provide proof that the Workers' Compensation insurance policies contain a waiver of subrogation by the insurance company, except where such a provision is prohibited or limited by the laws of the jurisdiction in which the work is to be performed.

☒ **(F) Employers Liability Insurance**

Minimal Limits:

\$100,000 Each Accident;
\$100,000 Each Employee by Disease
\$500,000 Aggregate Disease

Additional Requirements:

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents as additional insureds on the certificate.

2.14.2 SubContractor Insurance Coverage- Deleted – Not Applicable

2.14.3 Certificates of Insurance and Other Requirements

Before this Contract is signed, and not less than 20 days before the insurance expiration date every year thereafter, the Contractor must provide evidence that the State and its agents, officers, and employees are listed as additional insureds under each commercial general liability and commercial automobile liability policy. The Contractor must provide DTMB-Purchasing Operations with all applicable certificates of insurance verifying insurance coverage or providing satisfactory evidence of self-insurance as required in Section 2.14.1, Liability Insurance. Each certificate must be on the standard "accord" form or equivalent and MUST CONTAIN THE APPLICABLE CONTRACT OR PURCHASE ORDER NUMBER. Each certificate must be prepared and submitted by the insurer and must contain a provision indicating that the coverage afforded will not be cancelled, materially changed, or not renewed without 30 days prior notice, except for 10 days for nonpayment of premium, to the Director of DTMB-Purchasing Operations. The notice to the Director of DTMB-Purchasing Operations must include the applicable Contract or Purchase Order number.

2.15 Indemnification

2.15.1 General Indemnification

To the extent permitted by law, the Contractor must indemnify, defend, and hold the State harmless from liability, including all claims and losses, and all related costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest and penalties), accruing or resulting to any person, firm, or corporation that may be injured or damaged by the Contractor in the performance of this Contract and that are attributable to the negligence or tortious acts of the Contractor, any of its subContractors, or by anyone else for whose acts any of them may be liable.

2.15.2 Code Indemnification - Deleted, Not Applicable

2.15.3 Employee Indemnification

In any claims against the State, its departments, agencies, commissions, officers, employees, and agents, by any employee of the Contractor or any of its subContractors, the indemnification obligation will not be limited in any way by the amount or type of damages, compensation, or benefits payable by or for the Contractor or any of its subContractors under worker's disability compensation acts, disability benefit acts, or other employee benefit acts. This indemnification clause is intended to be comprehensive. Any overlap in provisions, or the fact that greater specificity is provided as to some categories of risk, is not intended to limit the scope of indemnification under any other provisions.



2.15.4 Patent/Copyright Infringement Indemnification

(a) To the extent permitted by law, the Contractor must indemnify and hold the State harmless from liability, including all claims and losses, and all related costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest, and penalties) resulting from any action threatened or brought against the State to the extent that the action is based on a claim that any piece of equipment, software, commodity, or service supplied by the Contractor or its subContractors, or its operation, use, or reproduction, infringes any United States patent, copyright, trademark or trade secret of any person or entity.

(b) If, in the State's or the Contractor's opinion, any piece of equipment, software, commodity or service supplied by the Contractor or its subContractors, or its operation, use, or reproduction, is likely to become the subject of an infringement claim, the Contractor must, at its expense: (i) procure for the State the right to continue using the equipment, software, commodity or service or, if this option is not reasonably available to the Contractor; (ii) replace or modify to the State's satisfaction the same with equipment, software, commodity or service of equivalent function and performance so that it becomes non-infringing, or, if this option is not reasonably available to Contractor; (iii) accept its return by the State with appropriate credits to the State against the Contractor's charges and reimburse the State for any losses or costs incurred as a consequence of the State ceasing its use and returning it.

(c) Notwithstanding the foregoing, the Contractor has no obligation to indemnify or defend the State for, or to pay any costs, damages or attorneys' fees related to, any infringement claim based upon: (i) equipment, software, commodity or service developed based on written specifications of the State; (ii) use of the equipment, software, or commodity in a configuration other than implemented or approved by the Contractor, including any modification of the same by the State; or (iii) the combination, operation, or use of the equipment, software, or commodity with equipment, software, or commodities not supplied by the Contractor under this Contract.

2.15.5 Continuing Obligation

The Contractor's duty to indemnify under Section 2.15, Indemnification, continues in full force and effect, notwithstanding the expiration or early cancellation of the Contract, with respect to any claims based on facts or conditions that occurred before expiration or cancellation.

2.15.6 Indemnification Procedures

These procedures apply to all indemnity obligations:

(a) After the State receives notice of an action or proceeding involving a claim for which it will seek indemnification, the State must promptly notify the Contractor of the claim and take, or assist the Contractor in taking, any reasonable action to avoid a default judgment against the Contractor. Failure to notify the Contractor does not relieve the Contractor of its indemnification obligations except to the extent that the Contractor can prove damages attributable to the notification failure. Within 10 days following receipt of notice from the State relating to any claim, the Contractor must notify the State whether the Contractor agrees to assume control of the defense and settlement of that claim (a "Notice of Election"). After notifying the Contractor of a claim and before the State receives the Contractor's Notice of Election, the State is entitled to defend against the claim, at the Contractor's expense, and the Contractor will be responsible for any reasonable costs, including attorney fees, incurred by the State in defending against the claim during that period.

(b) If the Contractor delivers a Notice of Election relating to any claim: (i) the State is entitled to participate in the defense of the claim and to employ counsel at its own expense to assist in handling the claim and to monitor and advise the State about the status and progress of the defense; (ii) the Contractor must, at the request of the State, demonstrate the Contractor's financial ability to carry out its defense and indemnity obligations under this Contract; (iii) the Contractor must periodically advise the State about the status and progress of the defense and must obtain prior approval of the State before entering into any settlement of the claim or ceasing to defend against the claim; and (iv) to the extent that any principles of Michigan



governmental or public law may be involved or challenged, the State has the right, at its own expense, to control the defense of that portion of the claim. The State may retain control of the defense and settlement of a claim by notifying the Contractor within 10 days after the State's receipt of the Contractor's information requested by the State under clause (ii) of this paragraph, if the State determines that the Contractor has failed to demonstrate to the reasonable satisfaction of the State the Contractor's financial ability to carry out its defense and indemnity obligations under this Section. Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. In the event the insurer's attorney represents the State under this Section, the insurer's attorney may be required to be designated as a Special Assistant Attorney General by the Attorney General of the State of Michigan.

(c) If the Contractor does not deliver a Notice of Election relating to any claim of which it is notified, the State may defend the claim in a manner it deems appropriate, at the cost and expense of the Contractor. If it is determined that the claim was one against which the Contractor was required to indemnify the State, upon request of the State, the Contractor must promptly reimburse the State for all reasonable costs and expenses.

2.15.7 Limitation of Liability

Neither the Contractor nor the State is liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages. This limitation of liability does not apply to claims for infringement of United States patent, copyright, trademark or trade secrets; to claims for personal injury or damage to property caused by the gross negligence or willful misconduct of the Contractor; to claims covered by other specific provisions of this Contract calling for liquidated damages; or to court costs or attorneys' fees awarded by a court in addition to damages after litigation based on this Contract.

2.16 Termination by the State

2.16.1 Notice and Right to Cure

If the Contractor breaches this Contract, and the State, in its sole discretion, determines that the breach is curable, the State will provide the Contractor notice of the breach and a period of at least 30 days to cure the breach. The State does not need to provide notice or an opportunity to cure for successive or repeated breaches or if the State determines, in its sole discretion, that a breach poses a serious and imminent threat to the health or safety of any person or the imminent loss, damage, or destruction of any real or tangible personal property.

2.16.2 Termination for Cause

(a) The State may fully or partially terminate this Contract for cause by notifying the Contractor if the Contractor: (i) breaches any of its material duties or obligations (including a Chronic Failure to meet any SLA); or (ii) fails to cure a breach within the time period specified in a notice of breach provided by the State.

(b) The Contractor must pay all reasonable costs incurred by the State in terminating this Contract for cause, including administrative costs, attorneys' fees and court costs, and any additional costs the State incurs to procure the Deliverable(s) from other sources. Re-procurement costs are not consequential, indirect, or incidental damages, and cannot be excluded by any other terms otherwise included in this Contract, provided the costs are not in excess of 50% more than the prices for the Deliverable(s).

(c) If the State partially terminates this Contract for cause, any charges payable to the Contractor will be equitably adjusted to reflect those Deliverable(s) that are terminated. The State must pay for all Deliverable(s) for which Final Acceptance has been granted before the termination date. Any services or related provisions of this Contract that are terminated for cause must cease on the effective date of the termination.



(d) If the State terminates this Contract for cause and it is determined, for any reason, that the Contractor was not in breach of this Contract, the termination will be deemed to have been a termination under Section 2.16.3, Termination for Convenience, effective as of the same date, and the rights and obligations of the parties will be limited to those provided in that Section.

2.16.3 Termination for Convenience

The State may fully or partially terminate this Contract for its convenience if the State determines that a termination is in the State's best interest. Reasons for the termination are within the sole discretion of the State and may include: (a) the State no longer needs the Deliverable(s) specified in this Contract; (b) a relocation of office, program changes, or changes in laws, rules, or regulations make the Deliverable(s) no longer practical or feasible for the State; (c) unacceptable prices for Contract changes; or (d) falsification or misrepresentation, by inclusion or non-inclusion, of information material to a response to any RFP issued by the State. The State may terminate this Contract for its convenience by giving Contractor notice at least 30 days before the date of termination. If the State chooses to terminate this Contract in part, any charges payable to the Contractor must be equitably adjusted to reflect those Deliverable(s) that are terminated.

2.16.4 Termination for Non-Appropriation

(a) If this Contract extends for more than one fiscal year, continuation of this Contract is subject to the appropriation or availability of funds. If sufficient funds to enable the State to continue payment are not appropriated or otherwise made available, the State must fully or partially terminate this Contract at the end of the last period for which funds have been appropriated or otherwise made available. The State must give the Contractor notice at least 30 days before the date of termination, unless the State receives notice of the non-appropriation or unavailability less than 30 days before the end of the last period for which funds have been appropriated or otherwise made available.

(b) If funding for this Contract is reduced by law, or funds to pay the Contractor for the Deliverable(s) are not appropriated or are otherwise unavailable, the State may, upon 30 days notice to the Contractor, change the Deliverable(s) in the manner and for the periods of time the State may elect. The charges payable under this Contract will be equitably adjusted to reflect any Deliverable(s) not provided because of the reduction.

(c) If the State fully or partially terminates this Contract for non-appropriation, the State must pay the Contractor for all work-in-progress performed through the effective date of the termination to the extent funds are available.

2.16.5 Termination for Criminal Conviction

The State may terminate this Contract immediately and without further liability or penalty if the Contractor, an officer of the Contractor, or an owner of a 25% or greater share of the Contractor is convicted of a criminal offense related to a State, public, or private Contract or subContract.

2.16.6 Termination for Approvals Rescinded- Deleted – Not Applicable

2.16.7 Rights and Obligations upon Termination

- (a) If the State terminates this Contract for any reason, the Contractor must:
- (i) stop all work as specified in the notice of termination;
 - (ii) take any action that may be necessary, or that the State may direct, to preserve and protect Deliverable(s) or other State property in the Contractor's possession;
 - (iii) return all materials and property provided directly or indirectly to the Contractor by any entity, agent, or employee of the State;
 - (iv) transfer title in and deliver to the State, unless otherwise directed, all Deliverable(s) intended to be transferred to the State at the termination of the Contract (which will be provided to the State on an "As-Is" basis except to the extent the State compensated the Contractor for warranty services related to the materials);



- (v) to the maximum practical extent, take any action to mitigate and limit potential damages, including terminating or limiting subContracts and outstanding orders for materials and supplies; and
- (vi) take all appropriate action to secure and maintain State information confidentially in accordance with Section 2.11, Confidentiality.

(b) If the State terminates this Contract under Section 2.16.3, Termination for Convenience, the State must pay the Contractor all charges due for Deliverable(s) provided before the date of termination and, if applicable, as a separate item of payment, for work-in-progress, based on a percentage of completion determined by the State. All completed or partially completed Deliverable(s) prepared by the Contractor, at the option of the State, become the State's property, and the Contractor is entitled to receive equitable compensation for those Deliverable(s). Regardless of the basis for the termination, the State is not obligated to pay or otherwise compensate the Contractor for any lost expected future profits, costs, or expenses incurred with respect to Deliverable(s) not actually completed.

(c) If the State terminates this Contract for any reason, the State may assume, at its option, any subContracts and agreements for Deliverable(s), and may pursue completion of the Deliverable(s) by replacement Contract or as the State deems expedient.

2.16.8 Reservation of Rights

In the event of any full or partial termination of this Contract, each party reserves all rights or remedies otherwise available to the party.

2.16.9 Contractor Transition Responsibilities

If this Contract terminates under Section 2.16, Termination by the State, the Contractor must make reasonable efforts to transition the performance of the work, including all applicable equipment, services, software, and leases, to the State or a third party designated by the State within a reasonable period of time that does not exceed 120 days from the date of termination. The Contractor must provide any required reports and documentation.

2.16.10 Transition Payments

If the transition responsibilities outlined in Section 2.16.9, Contractor Transition Responsibilities, arise based on a termination of this Contract, reimbursement will be governed by the provisions of Section 2.16, Termination by the State. If the transition results from expiration, the Contractor will be reimbursed for all reasonable transition costs (i.e., costs incurred after the expiration within the time period in Section 2.16.9 that result from transition operations) at the Contract rates. The Contractor must prepare an accurate accounting from which the State and the Contractor may reconcile all outstanding accounts.

2.17 Termination by the Contractor

2.17.1 Termination – Deleted, Not Applicable

2.18 Stop Work

2.18.1 Stop Work Order – Delete – Not Applicable

2.18.2 Termination of Stop Work Order – Delete – Not Applicable

2.18.3 Allowance of the Contractor's Costs – Delete – Not Applicable

2.19 Reserved

2.20 Dispute Resolution

**2.20.1 General**

- (a) The Contractor must submit any claim related to this Contract to the State under Section 2.3.6, Notices, together with all supporting documentation for the claim.
- (b) The representatives of the Contractor and the State must meet as often as the parties reasonably deem necessary to gather and furnish to each other all information related to the claim.
- (c) During the course of negotiations, each party will honor all reasonable requests made by the other for non-privileged information reasonably related to the claim.

2.20.2 Informal Dispute Resolution

- (a) If, after a reasonable time following submission of a claim under Section 2.20.1, General, the parties are unable to resolve the claim, the parties must meet with the Director of DTMB-Purchasing Operations, or his or her designee, for the purpose of attempting to resolve the dispute without the need for formal legal proceedings.
- (b) Within 60 calendar days of the meeting with the Director of DTMB-Purchasing Operations, or such other time as agreed to by the parties, the Director of DTMB-Purchasing Operations will issue a written recommendation regarding settlement of the claim. The Contractor must notify DTMB-Purchasing Operations within 21 days after the recommendation is issued whether the Contractor accepts or rejects the recommendation. Acceptance by the Contractor constitutes the final resolution of the claim addressed in the recommendation, and the Contractor may not assert that claim in any future litigation or other proceeding between the parties.
- (c) The recommendation of the Director of DTMB-Purchasing Operations is not admissible in any future litigation or other proceeding between the parties. The conduct and statements made during the course of negotiations or dispute resolution under Section 2.20, Dispute Resolution, are subject to Michigan Rule of Evidence 408 and are not admissible in any future litigation or other proceeding between the parties.
- (d) This section will not be construed to prohibit either party from instituting formal proceedings to avoid the expiration of any applicable limitations period, to preserve a superior position with respect to other creditors, or under Section 2.20.3, Injunctive Relief.
- (e) DTMB-Purchasing Operations will not mediate disputes between the Contractor and any other entity, except State agencies, concerning responsibility for performance of work.

2.20.3 Injunctive Relief

A claim between the State and the Contractor is not subject to the provisions of Section 2.20.2, Informal Dispute Resolution, where a party makes a good faith determination that a breach of the Contract by the other party will result in damages so immediate, so large or severe, and so incapable of adequate redress that a temporary restraining order or other injunctive relief is the only adequate remedy.

2.20.4 Continued Performance

Each party will continue performing its obligations under the Contract while a claim is being resolved, except to the extent the claim precludes performance and without limiting either party's right to terminate the Contract as provided in Section 2.16, Termination by the State or Section 2.17, Termination by the Contractor. A claim involving payment does not preclude performance.

2.21 Disclosure Responsibilities**2.21.1 Disclosure of Litigation**

- (a) Within 30 days after receiving notice of any litigation, investigation, arbitration, or other proceeding (collectively, "Proceeding") that arises during the term of this Contract, the Contractor must disclose the following to the Contract Administrator:



- (i) A criminal Proceeding involving the Contractor (or any SubContractor) or any of its officers or directors;
- (ii) A parole or probation Proceeding;
- (iii) A Proceeding involving the Contractor (or any SubContractor) or any of its officers or directors under the Sarbanes-Oxley Act; and
- (iv) A civil Proceeding to which the Contractor (or, if the Contractor is aware, any SubContractor) is a party, and which involves (A) a claim that might reasonably be expected to adversely affect the viability or financial stability of the Contractor or any SubContractor; or (B) a claim or written allegation of fraud against the Contractor (or, if the Contractor is aware, any SubContractor) by a governmental or public entity arising out of the Contractor's business dealings with governmental or public entities.

(b) Information provided to the State from the Contractor's publicly filed documents will satisfy the requirements of this Section.

(c) If any Proceeding that is disclosed to the State or of which the State otherwise becomes aware, during the term of this Contract, would cause a reasonable party to be concerned about: (i) the ability of the Contractor (or a SubContractor) to continue to perform this Contract; or (ii) whether the Contractor (or a SubContractor) is engaged in conduct that is similar in nature to the conduct alleged in the Proceeding and would constitute a breach of this Contract or a violation of federal or state law, regulations, or public policy, then the Contractor must provide the State all requested reasonable assurances that the Contractor and its SubContractors will be able to continue to perform this Contract.

2.21.2 Other Disclosures

The Contractor must notify DTMB-Purchasing Operations within 30 days of:

- (a) becoming aware that a change in the Contractor's ownership or officers has occurred or is certain to occur; or
- (b) any changes to company affiliations.

2.21.3 Call Center Disclosure – Delete – Not Applicable

2.22 Extended Purchasing

2.22.1 MiDEAL Requirements – Delete – Not Applicable

2.22.2 State Administrative Fee –Delete – Not Applicable

2.22.3 State Employee Purchase Requirements- Deleted, Not Applicable

2.23 Laws

2.23.1 Governing Law

This Contract is governed by, and construed according to, the substantive laws of the State of Michigan without regard to any Michigan choice of law rules that would apply the substantive law of another jurisdiction to the extent not inconsistent with or preempted by federal law.

2.23.2 Compliance with Laws

The Contractor must comply with all applicable federal, state, and local laws and ordinances in providing the Deliverable(s).

2.23.3 Jurisdiction

Any dispute arising from the Contract must be resolved in the State of Michigan. With respect to any claim between the parties, the Contractor consents to venue in Ingham County, Michigan, and irrevocably waives any objections to this venue that it may have, such as lack of personal jurisdiction or *forum non conveniens*. The Contractor must appoint agents in the State of Michigan to receive service of process.

**2.23.4 Nondiscrimination**

In the performance of this Contract, the Contractor agrees not to discriminate against any employee or applicant for employment, with respect to his or her hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital status, or physical or mental disability. The Contractor further agrees that every subContract entered into for the performance of this Contract will contain a provision requiring non-discrimination in employment, as specified here, binding upon each SubContractor. This covenant is required under the Elliott-Larsen Civil Rights Act, 1976 PA 453, MCL 37.2101, *et seq.*, and the Persons with Disabilities Civil Rights Act, 1976 PA 220, MCL 37.1101, *et seq.*, and any breach of this provision may be regarded as a material breach of the Contract.

2.23.5 Unfair Labor Practices

Under 1980 PA 278, MCL 423.321, *et seq.*, the State must not award a Contract or subContract to an employer whose name appears in the current register of employers failing to correct an unfair labor practice compiled under MCL 423.322. This information is compiled by the United States National Labor Relations Board. A Contractor of the State, in relation to the Contract, must not enter into a Contract with a SubContractor, manufacturer, or supplier whose name appears in this register. Under MCL 423.324, the State may void any Contract if, after award of the Contract, the name of the Contractor as an employer or the name of the SubContractor, manufacturer or supplier of the Contractor appears in the register.

2.23.6 Environmental Provision

For the purposes of this section, "Hazardous Materials" include asbestos, ACBMs, PCBs, petroleum products, construction materials including paint thinners, solvents, gasoline, oil, and any other material the manufacture, use, treatment, storage, transportation or disposal of which is regulated by the federal, state, or local laws governing the protection of the public health, natural resources, or the environment:

- (a) The Contractor must use, handle, store, dispose of, process, transport, and transfer any Hazardous Material according to all federal, State, and local laws. The State must immediately advise the Contractor of the presence of any known Hazardous Material at the work site. If the Contractor encounters material reasonably believed to be Hazardous Material that may present a substantial danger, the Contractor must:
 - (i) immediately stop all affected work;
 - (ii) notify the State in accordance with Section 2.3.6, Notices;
 - (iii) notify any entities required by law; and
 - (iv) take appropriate health and safety precautions.
- (b) The State may issue a Stop Work Order if the material is a Hazardous Material that may present a substantial danger and the Hazardous Material was not brought to the site by the Contractor, or does not wholly or partially result from any violation by the Contractor of any laws covering the use, handling, storage, disposal of, processing, transport and transfer of Hazardous Materials. The State may remove the Hazardous Material, render it harmless, or terminate the affected work for the State's convenience.
- (c) If the Hazardous Material was brought to the site by the Contractor, or wholly or partially results from any violation by the Contractor of any laws covering the use, handling, storage, disposal of, processing, transport and transfer of Hazardous Material, or from any other act or omission within the control of the Contractor, the Contractor must bear its proportionate share of the delay and costs involved in cleaning up the site and removing and rendering harmless the Hazardous Material according to applicable laws.

2.23.7 Freedom of Information

This Contract and all information submitted to the State by the Contractor is subject to the Michigan Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231, *et seq.*

2.23.8 Workplace Safety and Discriminatory Harassment

In performing Services for the State, the Contractor must comply with the Department of Civil Services Rule 2-20 regarding Workplace Safety and Rule 1-8.3 regarding Discriminatory Harassment. In addition, the Contractor must comply with Civil Service regulations and any applicable agency rules provided to the Contractor. For Civil Service Rules, see <http://www.mi.gov/mdcs/0,1607,7-147-6877---,00.html>

**2.23.9 Prevailing Wage - Deleted - Not Applicable****2.23.10 Abusive Labor Practices**

The Contractor may not furnish any Deliverable(s) that were produced fully or partially by forced labor, convict labor, forced or indentured child labor, or indentured servitude.

“Forced or indentured child labor” means all work or service (1) exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or (2) performed by any person under the age of 18 under a Contract the enforcement of which can be accomplished by process or penalties.

2.24 General Provisions**2.24.1 Bankruptcy and Insolvency**

The State may, without prejudice to any other right or remedy, fully or partially terminate this Contract and, at its option, take possession of the work-in-progress and finish the work-in-progress by whatever method the State deems appropriate if:

- (a) the Contractor files for bankruptcy protection;
- (b) an involuntary petition is filed against the Contractor and not dismissed within 30 days;
- (c) the Contractor becomes insolvent or a receiver is appointed due to the Contractor's insolvency;
- (d) the Contractor makes a general assignment for the benefit of creditors; or
- (e) the Contractor or its affiliates are unable to provide reasonable assurances that the Contractor or its affiliates can provide the Deliverable(s) under this Contract.

Contractor will place appropriate notices or labels on the work-in-progress to indicate ownership by the State. To the extent reasonably possible, work-in-progress must be stored separately from other stock and marked conspicuously with labels indicating State ownership.

2.24.2 Media Releases

News releases (including promotional literature and commercial advertisements) pertaining to the RFP and this Contract or the project to which it relates will not be made without prior approval by the State, and only in accordance with the instructions from the State.

2.24.3 Contract Distribution

DTMB-Purchasing Operations retains the sole right of Contract distribution to all State agencies and local units of government unless other arrangements are authorized by DTMB-Purchasing Operations.

2.24.4 Permits Deleted – Not Applicable**2.24.5 Website Incorporation**

The State is not bound by any content on the Contractor's website unless incorporated directly into this Contract.

2.24.6 Future Bidding Preclusion -Deleted, Not Applicable**2.24.7 Antitrust Assignment**

The Contractor assigns to the State any claim for overcharges resulting from state or federal antitrust violations to the extent that those violations concern materials or services supplied by third parties toward fulfillment of the Contract.

**2.24.8 Disaster Recovery**

Contractor and the State recognize that the State provides essential services in times of natural or man-made disasters. Therefore, except as mandated by federal disaster response requirements, Contractor personnel dedicated to providing Deliverable(s) under this Contract will provide the State with priority.

2.24.9 Legal Effect

The State is not liable for costs incurred by the Contractor or for payment(s) under this Contract until the Contractor is authorized to perform under Section 1.2.4, Ordering.

2.24.10 Entire Agreement

This Contract constitutes the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter. All attachments referenced in this Contract are incorporated in their entirety and form part of this Contract.

2.24.11 Order of Precedence

Any inconsistency in the terms associated with this Contract will be resolved by giving precedence to the terms in the following descending order:

- (a) Mandatory sections (2.1.1, Contract Term, 2.24.9, Legal Effect, 2.2.2, Payment Deadlines, 2.14, Insurance, 2.15, Indemnification, 2.16, Termination, 2.23, Governing Law, 2.15.7, Limitation of Liability);
- (b) The most recent Statement of Work related to this Contract;
- (c) All sections from Article 2 - Terms and Conditions, not listed in subsection (a);
- (d) Any attachment or exhibit to the Contract documents;
- (e) Any Purchase Order, Direct Voucher, or Procurement Card Order issued under the Contract; and
- (f) Bidder Responses contained in any of the RFP documents.

2.24.12 Headings

The captions and section headings used in this Contract are for convenience only and may not be used to interpret the scope and intent of this Contract.

2.24.13 Form, Function and Utility – Deleted – Not Applicable**2.24.14 Reformation and Severability**

Each provision of the Contract is severable from all other provisions of the Contract. If any provision of this Contract is held unenforceable, then the Contract will be modified to reflect the parties' original intent. All remaining provisions of the Contract remain in full force and effect.

2.24.15 Approval

Unless otherwise provided in this Contract, approval(s) must be in writing and must not be unreasonably withheld or delayed.

2.24.16 No Waiver of Default

Failure by a party to insist upon strict adherence to any term of the Contract does not waive that party's right to later insist upon strict adherence to that term, or any other term, of the Contract.

2.24.17 Survival

The provisions of this Contract that impose continuing obligations, including warranties, indemnification, and confidentiality, will survive the expiration or termination of this Contract.



**Attachment A
Milk-Based Infant Formula Rebate Pricing**

MICHIGAN WIC PROGRAM

Milk-Based Infant Formula

Physical Form	Product Brand Name Being Bid	Unit Size (in ounces)	Reconstituted Oz. Per Unit	Wholesale Price per Unit	Rebate Bid per Unit	Net Cost per Unit	Percent Rebate
Liquid Concentrate	Enfamil PREMIUM Infant	13.0	26.0	\$4.160	\$3.915	\$0.245	94.111%
Powdered	Enfamil PREMIUM Infant	12.5	90.0	\$12.660	\$11.515	\$1.145	90.956%
Ready-to-Feed	Enfamil PREMIUM Infant	32.0	32.0	\$5.950	\$2.380	\$3.570	40.000%